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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-652

ESTATE OF JOAN WERSETSKY, DEC'D.
JOSEPH WERSETSKY, ADMINISTRATOR
Petitioner

V.

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Joseph Wersetsky, Adm.
126 Catherine Street
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In the Supreme Court of the United States

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ESTATE OF JOAN WERSETSKY, DEC'D.
JOSEPH WERSETSKY, ADMINISTRATOR
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER, ESTATE OF JOAN WERSETSKY, DEC'D. JOSEPH WERSETSKY, ADM., RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION OF THE U. S. COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED IN THIS PROCEEDING ON JUNE 10, 1974.

OPINIONS BELOW

No opinion was filed reported by the Court of Appeals for the First Circuit. A copy of Memorandum and Order dated June 10, 1974 is attached to this Petition as Appendix A. A copy of Memorandum and Order, dated June 27, 1974, denying a Petition for Rehearing is attached to this Petition as Appendix B.

No Tax Court opinion or report was received by the Petitioner. A copy of the Tax Court Order of Dismissal and Decision, dated June 4, 1973, is attached to this Petition as Appendix C.

JURISDICTION

The Memorandum and Order of the Court of Appeals for the First Circuit was entered on June 10, 1974. Thereafter on June 24, 1974, or June 25, 1974, a Petition for Rehearing, or in the alternative, a Petition for In Banc consideration, etc. was filed and was denied on June 27, 1974. Upon application on September 24, 1974, an Order extending time to file Petition for Writ of Certiorari to and including November 24,1974 was signed by an Associate Justice of the Supreme Court of the United States, William J. Brennan, Jr., September 24, 1974, is a Sunday.

Sunday. The jurisdiction of this Court is invoked under 28 U.S.C. Sec.1254 (1), which provides as follows:

28 U.S.C. Sec.1254. Court of Appeals; certiorari; appeal; certified questions. Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decreed *** and under 26 U.S.C.A. (I.R.C. 1954) Section 7482 Courts of review. (a) Jurisdiction. The U. S. Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court except as provided in Section 1254 of Title 28 of the U.S.C., *** and the judgment of such court shall be final, except that it shall be subject to review by the Supreme Court of the U.S. upon certiorari, in the same manner provided in Section 1254 of Title 28 of the U. S. Code.

QUESTIONS PRESENTED

Did the Court of Appeals commit a harmful error in affirming, a Tax Court Order of dismissal and decision that was not only double patenting but invalid according to statutory law.

Was petitioner's right to due process of law, contained in the fifth amendment to the Constitution, as pertains to property, infringed upon by the Courts below?

Was petitioner's right to privacy embodied in the fourth and ninth amendments to the Constitution infringed upon under the color of authority by the courts below and the Bureau of Internal Revenue?

STATEMENT OF THE CASE

(a) Nature of the case and course of proceedings below.

The action was brought pursuant to 26 U.S.C.A., I.R.C. 1954, Section 7482; courts of review; by filing a Notice of Appeal, relating to deficiencies and penalties, to the United States Court of Appeals for the First Circuit, via the Tax Court.

Petitioner, as appellant and administrator and for a brief period through the legal services of an attorney and his associates, attempted during the course of proceedings to obtain a Court of Appeals Order to quash, or reverse Tax Court decision that was not only unjust and illegal but resulted in loss of property, via Internal Revenue Service levies coupled with illegal jeopardy assessments, approximately 52 days after issuance of said Tax

Court Order of Dismissal and Decision entered on June 5, 1973.

Petitioner's efforts, pursuant to FRAP Rules, to obtain

(1) A Writ of Mandamus was denied in violation of FRAP Rule 21(b);

(2) Motion for Release and Request for preliminary hearing denied although authorized by FRAP Rule 11(g);

(3) Modification of Record on Appeal lodged but restricted belatedly;

(4) Request for Order to Quash or Reverse etc., Denied;

(5) Petition for Rehearing of Request for Order to Quash or Reverse, etc. Denied.

(6) Request to file an appendix under FRAP Rule 30(c). Denied.

(7) Request to reconsider the filing of an appendix. Denied.

(8) Request for En Banc consideration. Denied.

(9) Request to stay proceedings. Unanswered to this date.

(10) Request for Continuance. Denied.

(b) Petitioner retained an Attorney to administer deceased daughter's estate. An offer in compromise and a check for all income and estate taxes to date was submitted to District Director of Internal Revenue on August 28, 1970. Petitioner believed that offer had been effected as the amount of $25,000.00 tendered was not returned as required by U.S.C.A. (I.R.C. 1954) section 7809, in the event the offer is rejected. Petitioner received a statutory notice of deficiency on January 24, 1972. On April 7, 1972, petitioner mailed a letter to Clerk of Tax Court requesting a copy of the rules for filing a petition with Tax Court. The Court filed the letter as a tentative petition illegally and extended the time to file an amended petition beyond the statutory limit of 90 days. Petitioner filed an amended petition through Tax Court, on May 22, 1972, 28 daus after statutory period for filing a petition under section 6213(a), primarily to obey Tax Court in order to get a ruling on the offer in compromise which had not been formally rejected. During the course of

proceedings a trial date for April 9, 1973, was set and petitioner appeared in Tax Court. Respondent requested a pre-trial conference in order to obtain stipulations and it was at this conference where trial judge would not rule on the issue even though petitioner presented original paid certified check to said judge for examination. Under Tax Court rules of practice Rule 28, Pretrial conferences (e) Order. - the judge holding a pretrial conference may, in his discretion issue an appropriate order. Upon request petitioner permitted respondent to take copies of check for purposes of evidence. It cannot be said that petitioner did not present evidence relevant to the case in behalf of estate. A pretrial conference was set for the following day at which time a continuance was verbally agreed to but upon arriving home and discussing the matter with spouse petitioner requested a trial for Thursday or Friday the same week. Judge agreed but respondent claimed he had dismissed his witness and could not possibly be ready for Friday. Respondent entered a motion for continuance that was granted and petitioner received an order from Chief Judge that a trial date was set for May 21, 1973, at which time petitioner was present, ready for trial, and again the respondent requested a pretrial conference and a postponement to May 25, 1973. There was a calendar call hearing before recess on May 21, 1973, at which time once again the issue of compromise was brought forth and trial judge stated she had nothing to do with

compromises. The petitioner then brought up the issue of jurisdiction and was told that would be discussed later. The afore-judge did admit that if the deficiencies were untimely then the Court had no jurisdiction. Prior to recess trial judge granted respondent's motion for postponement and made it clear that unless petitioner came to some sort of conclusion, meaning stipulation with respondent, there would be no trial. Quote, The Court:

"And only if you come to some sort of conclusion between now and the day of the trial we will try it." Petitioner lays claim to duress in this proceeding before justice. After recess petitioner was permitted a "discussion" with an order from judge to court reporter "to go off the record." The memory of that "discussion" is attached as an exhibit. A trial was held four days later by Tax Court ex parte. Petitioner was not present for several reasons. Respondent's stipulations were detrimental to Petitioner's rights and privacy and would jeopardize Petitioner's position to prevail. In addition, Tax Court presiding judge erred. Tax Court rules of practice Rule 27.(c)(1) Each case, when at issue, will be placed upon a calendar for trial in accordance with Rule 26 and the Clerk, not less than 90 days in advance unless

authorized by the Chief Judge, will notify the parties of the place where and the date and time when it will be called.

Under Section 7458. Hearings, Notice and opportunity to be heard upon any proceedings instituted before the Tax Court shall be given to the taxpayer and the Secretary or his delegate. Also Rule 43 Evidence, U.S. Dist.Ct.

On June 7, 1973, petitioner received respondent's motion to dismiss that was granted and the Tax Court Order of Dismissal and Decision, entered June 5, 1973, in U.S. Tax Court. The aforesaid "Order" decided that income taxes for a 3 year period prior to decedent's demise were due and owing, contrary to present tax laws as pertain to only one full year and a short period in the event deceased taxpayer earned enough income in short period, (U.S. Master Tax Guide, Commerce Clearing House, Inc., page 177 of 1974, Master Tax Guide), and said Order mismissed the case for lack of prosecution which in effect sustains Commissioner's determination of alleged deficiency, under section 7549.

The basis of Federal jurisdiction in the Court of first instance is found in 26 U.S.C.A. (I.R.C. 1954) Section 6213. Restrictions applicable to deficiencies, petition to Tax Court - (a) Time for filing petition and restrictions on assessment.

Within 90 days, *** after the notice of deficiency authorized in section 6212 is mailed

*** the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. ***.

On August 22, 1973, Tax Court filed petitioner's letter, "Request for Special Leave, under Court's Rules of Practice, Rule 19. Motions (f), and denied said request the same day.

On August 29, 1973, Tax Court filed petitioner's notice of appeal from Tax Court Decision entered on June 5th, 1973, relating to deficiencies and penalties.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erroneous decision, affirming a Tax Court Order of Dismissal and Decision and sanctioning illegal and despicable proceedings in said Tax Court and executing similar proceedings repugnant to the fifth amendment of the U.S. Constitution as pertains to due process of law, warrants a review by the Supreme Court for the following reasons:

The Court of Appeals erred in sanctioning;

A Tax Court violation of 26 U.S.C.A. (IRC 1954), Section 6213(a) pertaining to absolute statutory time limit (90 days) for filing a petition with Tax Court for redetermination of

deficiencies on the ground Tax Court could "bend" the rules preferring to use the term "rules" instead of the proper term "statute." See Ex. A.

A Verbis Legis Non Est Recendendum. Black Dict. The words of a statute must not be departed from. 5 Coke 119; Wing. Max. 25. Case authority supports this maxim. Black Dict., also Praetextu Liciti non debet admitti illicitum. Under pretext of a legality, what is illegal ought not to be admitted. Wing. Max. P. 728 max. 196. Black Dict.

Petitioner contends Tax Court jurisdiction did not attach as amended Petition was not filed within 90 days and therefore Tax Court Order of Dismissal and Decision was not valid. Due process of law obligates, pursuant to statutory provisions.

The Tax Court to dismiss the petition for lack of jurisdiction. Board of Tax Appeals (Tax Court) held without power to consider petition for redetermination of deficiency in income tax determined by C.I.R. where petition is filed after expiration of statutory period. Rev. Act 1928 Section 272 (a,c), 26 U.S.C.A. Int. Rev. Code Section 272. Poyner v. CIR, 81 F. 2d 521. See also Revenue Act 1934 Section 272, 26 U.S.C.A. (I.R.C. 1939) 272 Stebbins Estate v. Helvering, 121 F. 2d 892, 74 App. D.C. 21.

See also 26 U.S.C.A. (I.R.C. 1954) Sections 6212(a), 6213(a), Rich v. C.I.R., 250 F. 2d 170. The aforesaid statutory provision, relevant case authorities, and the petitioner's questioning of Tax Court's ruling on Affirmance. It cannot be argued that the Court of Appeals lacked the powers to modify or reverse upon review:

Section 301.7482 Statutory provisions; courts of review.
Section 7482. Courts of review.

(c) Powers - (1) To affirm, modify, or reverse. Upon such review, such courts shall have power to affirm or, if the decision the tax court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

The key word is justice and I believe that Congress had the Constitution in mind and the fifth amendment to that Constitution as pertains to due process of law, when the phrase "as justice may require" was included under (c) Powers. The relevant word is decision, the construction of which is adequately defined in the Opinion of Macgruder, Chief Judge, and embodied in 26 Section 7482 Procedure and Administration Ch. 76 Note 8. Decisions reviewable, page 416 as follows: In section 1141 (I.R.C. 1939) providing that Court of Appeals shall have exclusive jurisdiction to review decisions of Tax

Court referred to in section 1117 (I.R.C. 1939), describing the method of making determinations in Tax Court, and such decisions are only those dismissing a proceeding before Tax Court, whether for lack of jurisdiction or otherwise, or formally determining a deficiency or lack of deficiency. C.I.R. v. Smith Paper, Inc. C.A. 1, 1955, 222 F. 2d 126.

From the point of illegal Tax Court jurisdiction the Court of Appeals erred in not reversing the Tax Court decision, according to law.

Having the power and authority to reverse an illegal Tax Court order of dismissal and decision that was issued by said Court whose jurisdiction was invalidated by statutory provision governing such jurisdiction, Court of Appeals affirmance was error.

Court of Appeals affirmance of Tax Court decision, in effect, sanctions a Tax Court jurisdiction that is refutable according to statutory provisions of the Code, 26 U.S.C.A. (I.R.C. 1954) section 6213(a) and sections 7121. Cloains agreements; 7122 Compromises. The fact that the I.R.S. accepted a sum of $25,000.00 tendered with an offer in compromise for all income and estate taxes to date, August 28, 1970, pursuant to agreement on face of check and did not and has not returned the amount

tendered, as per express requisite contained in section 7809 (b)(1) upon rejection of offer, the closing agreement is binding upon both parties and cannot be reopened or modified except for fraud or malfeasance or the misrepresentation of a material fact. Section 7809. Deposit of Collections (b). Deposit funds - In accordance with instructions of the Secretary or his delegate, there shall be deposited with the Treasurer of the United States in a deposit fund account -

(1) Sums offered in compromise - Sums in compromise under the provisions of section 7122; ***. Upon the acceptance of such offer in compromise or offer for the purchase of such real estate, the amount so accepted shall be withdrawn from such deposit fund account and deposited in the Treasury of the United States as internal revenue collections. Upon the rejection of any such offer, the Secretary or his delegate shall refund to the maker of such offer the amount thereof. ***.

Court of Appeals chose to disregard the compromise issue as matter raised without any substance, notwithstanding fact that Government did not deny the existence of or amount tendered with compromise, prior to issuance of a notice of deficiency. The aforesaid fact deprived Tax Court of jurisdiction as the payment of an amount as a tax before issuance of the statutory notice has the effect of a waiver and will deprive the Tax Court of jurisdiction. 26 U.S.C.A. (I.R.C. 1954) section 6213(a).

On page 637 of Flora v. U.S. Wyo. 1960, 80 S. Ct. 630, The House Committee Report, for example, explained the purpose of the bill as follows:

"The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes ***." Petitioner claims and contends that the compromise payment in August of 1970 prohibits appeal to Tax Court pursuant to intent of Act of Congress to establish a Board of Tax Appeals to review and redetermine asserted deficiencies of Commissioner of Internal Revenue.

Privacy, Right of - Blacks 1358, The right to be let alone, the right of a person to be free from unwarranted publicity, Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 7 S.E. 2d 169, 171, 127 A.L.R. 110. The right of an individual (or corporation) to withhold himself and his property from public scrutiny, if he so chooses. It is said to exist only so far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain or malice. Federal Trade Commission v. American Tobacco Co., 44 S.Ct. 336, 264 U.S. 298, L.Ed. 696, 32 A.L.R. 786.

The fourth amendment's right of privacy is enforceable against the states through the due process clause. U.S.C.A. Constitution amends 4, 14. Mapp V. Ohio, 81 S.Ct. 1684, 367 U.S. 643, 6 L.Ed. 2d 1081, 84 A.L.R. 2d 933, rehearing denied, 82 S.Ct. 23, 368 U.S. 871, 7 L.Ed. 2d 72.

Joe Louis Case - 4 Civil Rights Key 1, 2. Property rights are not less deserving of protection under Constitution and Federal Civil Rights Act than are human freedoms. 28 U.S.C.A. Section 1343. Joe Louis Milk Co. v. Hershey, D.C. Ill 243 F. Supp. 351, 354.

Volume 10A Federal Practice Digest 79. Deprivation of life and liberty in general. U.S. Ill, 1968. Fifth and fourteenth amendments forbid both federal government and state from depriving any person of life, liberty or property without due process of law. U.S.C.A. Constitution amends 5, 14. Bloom v. State of Illinois, 88 S.Ct. 1477, 391 U.S. 194, 20 L.Ed. 522.

Petitioner contends the statute of limitations was applicable and was brought to the attention of Court of Appeals and ignored on the ground that it was not brought before the Court below. If Petitioner's memory is correct it was presented verbally in Tax Court.

Court of Appeals in affirming Tax Court decision sanctioned Tax Court's refusal to deny

petitioner's request for special leave to file a motion to revise a decision under Tax Court Rule 19. Motions (f).

Notwithstanding, law creating Tax Court was not unconstitutional, a judicial question arises. Petitioner suggests, Tax Court as an entity with limited power is unconstitutional as by and in itself Tax Court lacks the plenary judicial power to exercise due process of law as prescribed in the fifth amendment to the U.S. Constitution. The Petitioner's case is an example wherein a requested ruling on an offer in compromise could not be obtained.

Petitioner contends that his constitutional rights of privacy and due process of law were infringed upon by the Courts below and by the Bureau of Internal Revenue and calls upon this Court to exercise its Power of Supervision to correct the abuses suffered.

CONCLUSION

WHEREFORE, the Petitioner, for the facts, questions and reasons stated herein, prays and

requests that Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit, be granted.

Respectfully submitted,

Joseph Wersetsky, Adm.
126 Catherine Street
Williamnsett, Mass. 01013
Telephone (413) 536-7133

EXHIBIT A

THREE PAGES

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 73-1371

Estate of JOAN WERSETSKY, Deceased,
JOSEPH WERSETSKY, Administrator,
Petitioner, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent, Appellee

Before COFFIN, Chief Judge,
McENTEE and CAMPBELL, Circuit Judges

MEMORANDUM AND ORDER

Entered June 10, 1974

Taxpayer petitioned the Tax Court, requesting a trial in regard to deficiencies which had been levied upon his deceased daughter's estate. When, after receiving notice of the date of the trial,

taxpayer failed to appear at trial, the Commissioner's Motion to Dismiss was granted.

Taxpayer subsequently moved this court for "Release and Request for Preliminary Hearing: and a "Petition for Writ of Mandamus," seeking to have the Tax Court's order vacated or, in the alternative, seeking to have transmitted to this court only so much of the record as was selectively designated by taxpayer. These motions were denied by us, November 20, 1973. Taxpayer then filed with this court a :Request for Order to Quash or Reverse" the Tax Court's decision, alleging that the Tax Court lacked jurisdiction. We denied the request, since "(h)aving taken advantage of what can only be considered an effort by the Tax Court to bend the rules in the interest of justice, petitioner cannot now complain," March 13, 1974. Taxpayer subsequently sought to reargue his "Request," alleging that the limitations period had run on the deficiency assessments,a point never raised before the Tax Court. "Indulging the most favorable assumptions for petitioner," we found the request to be without merit, April 8, 1974.

Taxpayer having raised no further issues* with this court, and the record before us containing no evidence that the Tax Court abused its

discretion in dismissing taxpayer's suit. cf. Link v. Wabash RR. Co., 370 U.S. 626, 633 (1962), the decision of the Tax Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk

---

*The only new matter presented at oral argument before us was petitioner's skepticism supporting a requested stay of proceedings, that the Tax Court judge who dismissed the action, was a judge at the critical time. Whether or not we are required to respond, in light of taxpayer's basis of inquiry, we have ascertained from the Congressional Directory for 1973, 93rd Congress, First Session, that Cynthia Holcomb Hall was appointed to the United States Tax Court on August 30, 1972, for a 15 year term.

EXHIBIT B

TWO PAGES

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 73-1371

Estate of JOAN WERSETSKY, Deceased,
JOSEPH WERSETSKY, Administrator,
Petitioner, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent, Appellee

Before COFFIN, Chief Judge,
McENTEE and CAMPBELL, Circuit Judges

MEMORANDUM AND ORDER

Entered June 27, 1974

Petitioner;s motions for rehearing, pursuant to our Rule 15, and en banc consideration, pursuant to our Rule 16, are hereby denied.

Petitioner's arguments concerning alleged errors committed by the Tax Court have already received full consideration by this court. Petitioner's allegation of irregularities in the appointment of the Tax Court judge who presided over the initial disposition of his case is, even if justiciable, patently without merit.

We are by now well acquainted with petitioner's underlying claims and his many attempts to sustain them. While we are, of course, willing to give them full and careful consideration, we would caution petitioner against repetitive and groundless motions which ultimately abuse the court system. There is a point, which petitioner is approaching, where such tenacity becomes vexatious.

By the Court:

/s/ Dana H. Gallup
Clerk

(cc: Messrs. Wersetsky and Burt.)

EXHIBIT C

UNITED STATES TAX COURT
Washington

EST. OF JOAN WERSETSKY, DEC'D JOSEPH WERSETSKY, ADMINISTRATOR Petitioner,	)	
v.	)	Docket No. 2569-72
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the Trial Session at Washington D.C. on May 25, 1973 at which time counsel for respondent filed a motion fo dismiss for lack of prosecution. No appearance was made by or on behalf of petitioner. The court heard respondent's evidence in the case. After due consideration and for cause appearing in the transcript of this case, it is

ORDERED, that respondent's motion is granted and this case is dismissed for lack of prosecution. It is further

Ordered and DECIDED, that there are due from petitioner deficiencies in income tax for the taxable years 1967, 1968, and 1969 in the amounts

of $9,542.41, $16,338.43, and $18,976.92, respectively; penalties under Sec. 6651(a) for such years in the amounts of $2,385.52, $4,084.61, and $4,744.23, respectively;penalties under Sec. 6653(a) for such years in the amounts of $477.10, $816,92, and $948.85, respectively; and penalties under Sec. 6654 for such years in the amounts of $305.36, $522.83, and $607,26, respectively, as set forth in the statutory notice of deficiency dated January 24, 1972.

(Signed) Cynthia Holcomb Hall

Judge

Enter:

ENTERED JUN 5, 1973

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 73-1371

ESTATE OF JOAN WERSETSKY, Deceased,
JOSEPH WERSETSKY, Administrator,
Petitioner, Appellant,

v

COMMISSIONER OF INTERNAL REVENUE,
Respondent, Appellee

Before COFFIN, Chief Judge,
McENTEE and CAMPBELL, Circuit Judges

MEMORANDUM AND ORDER

Entered March 13, 1974

Petitioner has filed a "Request for Order to Quash or Reverse Tax Court Decision Entered on June 5th, 1973, in U.S. Tax Court, Washington, D.C. Under Docket No. 2569-72", basing his petition essentially on jurisdictional grounds.

We have reviewed the record, and the memoranda of both parties, and conclude that petitioner's request is frivolous and it is hereby denied. Indeed, most of that of which petitioner complains was brought about by his own actions. His most important complaint is that the Tax Court took jurisdiction of this petition for review of a deficiency assessment illegally, in that his formal petition was not filed until after the 90 day statutory period had run. The Tax Court had accepted a letter from petitioner which requested a copy of the rules for filing, and which was received shortly before the 90 days had run as a "tentative petition." It had done this in order to give the petitioner an opportunity to file in proper form, since the 90 days would otherwise have barred the petition. Having taken advantage of what can only be considered an effort by the Tax Court to bend the rules in the interest of justice, petitioner cannot now complain. The other matters raised are without any substance.

By the Court:

/s/ Dana H. Gallup
Clerk

(cc: Mr. Wersetsky and Mr. Crampton)

EXHIBIT E

UNITED STATES TAX COURT

1973 Sep 10 PM 5 08

Estate of Joan Wersetsky, Deceased) Joseph Wersetsky, Administrator) Petitioner-Appellant)	)	
v.	)	Docket No. 2659-72
Commissioner of Internal Revenue,) Respondent-Appellees)	)	

MOTION FOR ORDER OF PARTIAL TRANSCRIPTS OF PROCEEDINGS ON RECORD ON APPEAL

I. As per F.R.A.P. Rule 10 (b), petitioner-appellant, elects to order transcript of proceedings, pages 1 through 7, recorded on April 9th, 1973, at a hearing before the Honorable Irene Scott, at U.S. Tax Court in Washington, D.C.

II. Petitioner-appellant does not choose to order transcript of proceedings, pages 1 through 6, recorded on May 21, 1973, at a hearing before the Honorable Cynthia H. Hall, at U.S. Tax Court, in Washington, D.C., as transcript of proceedings is incomplete. There are material omissions in the transcript relevant to:

First: Accusations by the petitioner, that a violation of the Code of Federal Regulations under Section 301.7122-1 (d)(4), was committed by the Internal Revenue Service.

Second: The Citing of the Station 301.7122-1 (d)(4), by the petitioner, and the writing thereof by the Honorable Cynthia H. Hall.

Third: Statement made by the petitioner that the tax in dispute, had been paid with a $25,000.00 certified check, submitted with an offer in compromise.

Fourth: The questioning of the respondent, by the Honorable Cynthia H. Hall, as to the whereabouts of the $25,000.00 certified check and the respondent's reply.

Fifth: Remarks, made by the petitioner as to the burden of proof, incumbent upon the respondent, and the Honorable Cynthia H. Hall's reply.

Sixth: The petitioner's questioning the jurisdiction of the Tax Court to hear the case, on the grounds that payment of a tax, prior to issuance of statutory notice of deficiency deprives Tax Court of jurisdiction.

Unless the above omissions 1 through 6 are admitted into the transcript of proceedings that occurred at a hearing before the Honorable Cynthia H. Hall on May 21st, 1973, at U.S. Tax Court in Washington, D.C., petitioner-appellant does not elect to order transcript of proceedings recorded.

III. Petitioner-Appellant does not elect to order transcript of proceedings, pages 1 through 66, recorded on May 25th, 1973, at a trial before the Honorable Cynthia H. Hall, at U.S. Tax Court, in Wash ington, D.C., as petitioner-appellant was not present to cross examine the witness for the respondent, and ex parte statements are not evidence. Petitioner contends that trial was scheduled for Monday, May 21st per order of the Honorable W. M. Drennen. The trial was advanced to Friday, May 25th by the Honorable Cynthia H. Hall to acoommodate respondent's request for a trial on Thursday.

IV. As no transcript of pre-trial hearing held before the Honorable Irene Scott, on April 9th, 1973, at approximately 2:00 P.M. in her

chambers at Washington, D.C., is in the Record on Appeal, petitioner-appellant demands that the following be admitted in the Record.

First: Petitioner requested that a ruling be made by the Honorable Irene Scott as to whether or not the tax in question was paid by a certified check of $25,000.00, submitted with an offer in compromise.

Second: Upon request the certified check was handed to the Honorable Irene Scott.

Third: The respondent upon request, was permitted to make several copies of the check for his record.

Fourth: Statement by petitioner that had check and offer in compromise been rejected within a short time, petitioner would have resorted to filing a regular return for the year 1969 as he did with the State return.

Fifth: Petitioner was not negligent in filing a 1969 return as there was no need to file the return if a compromise had been effected and he was under the impression that it had been effected when certified check was cashed by the Internal Revenue Service.

V. Statement of issues to be presented on appeal.

First: That a compromise was effected on the day a certified check for $25,000.00 was deposited in the U.S. Treasury and credited towards payment of U.S. obligations.

Second: That the petitioner was misled by the I.R.S., into petitioning the U.S. Tax Court had no jurisdiction over.

Third: That the accusation by the respondent-appellee that petitioner-appellant failed to pay taxes is erroneous as the offer in compromise included payment of taxes for the years in question.

Fourth: Computation of alleged income and deficiencies, inaccurate.

Fifth: Untimely deficiencies and alleged penalties, additions to tax, plus interest.

Sixth: Statute of limitations as to liability of petitioner.

Signed: Joseph Wersetsky
Petitioner-Appellant
126 Catherine Street
Willimansett,Mass.

EXHIBIT F

ESTATE OF JOHN WERSETSKY, DEC'D JOSEPH WERSETSKY, ADMINISTRATOR Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent	)	August 20,1973 Docket No. 2569-72

REQUEST FOR SPECIAL LEAVE

Your Honor:

Under Rules of Practice, United States Tax Court, Rule 19, Motion (f), I hereby request Special Leave to file a motion on your Order and Decision that was Entered June 5th, 1973. Your Order and Decision state that there are due from Petitioner income tax deficiencies and penalties totaling $59,750.44.

Reasons for requesting Special Leave are:

(1) Thirty days have expired since entry of your Order and Decision.

(2) A trial held on May 25th, 1973 relevant to above case was held Exparte.

(3) A $25,000.00 certified check for all income and estate taxes to date, and specifically mentioned in the Petition was not given due consideration by the court.

Very truly yours,

Joseph Wersetsky, Adm.
126 Catherine Street
Willimansett, Mass.

P.S. Copy of your Order of Dismissal and Decision enclosed.

EXHIBIT G

April 7, 1972
126 Catherine ST.
Williamsett, Mass

Dear Sir:

Would you kindly send me a copy of the Rules for filing a petition with the Tax Court.

Very truly yours,
Joseph Wersetsky

EXHIBIT H

EXHIBIT I

NO. 10 HOLYOKE, MASSACHUSETTS August 28, 1970

53-137
113

THE HOLYOKE NATIONAL BANK

PAY TO THE ORDER OF District Director Internal Revenue Service $25,000.00

Twenty Five Thousand Dollars

FOR Federal Income and Federal Estate taxes to date. ESTATE OF Jan Wersetsky

TRUSTEE
EXECUTOR
ADMINISTRATOR

Joseph Wersetsky

PAID HOLYOKE NATIONAL BANK HOLYOKE, MASS. DATE ASST. CASHIER PAID DO NOT DESTROY

:0113=0137: 0-85 582 6 "000250000"

EXHIBIT J.

FIRST BANK AND TRUST COMPANY
of Hampden County
Springfield, Massachusetts 01101

No. 965600 53-100/113

Date May 12, 1972

FIRST BANK BRANCH

THE PURCHASER HEREOF AGREES TO INSERT IN INK HIS OWN NAME AND ADDRESS AS WELL AS THE NAME OF THE PAYEE ON THE BLANK WHERE INDICATED AND ASSUMES RESPONSIBILITY FOR ALL EVENTS MADE POSSIBLE BY HIS FAILURE TO DO SO.

VOID AND NOT NEGOTIABLE
IF FOR MORE THAN $500.00

Pay to the order of Treasurer of the United States

CUSTOMER COPY
BANK MONEY ORDER
NON NEGOTIABLE

SIGNATURE Dorothy

ADDRESS 126 Turner St. Holliman Heights, Mass.

PLEASE COMPLETE AND SIGN MONEY ORDER FORM PROMPTLY

SAVE THIS RECORD

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OTHER AUTHORITIES

Black's Law Dictionary, Rev. Fourth Ed. 11, 15

Webster's New Collegiate Dictionary, Sec. Ed. 15

Compton's Pictured Encyclopedia, 1953 Ed. page 353

Amendment 9. The enumeration in the Constituion of certain rights, shall not be construed to deny or disparage others retained by the people.

CASE AUTHORITIES

Bloom v. State of Illinois 88 S.Ct. 1477, 391 U.S. 194, 20 L. Ed. 522 16

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Poyner v. CIT, 81 F. 2d 521 11

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Stebbins Estate v. Helvering, 121 F. 2d 892, 74 App. D.C. 21 11

U.S. Master Tax Guide, Commerce Clearing House, Inc., page 177 of 1974 Master Tax Guide 9

Rule 43, Evidence, Rules of Civil Procedure for the United States District Courts 9

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-652

ESTATE OF JOAN WERSETSKY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the decision of the court of appeals holding that the Tax Court did not abuse its discretion in dismissing its case for want of prosecution. Petitioner, acting through its administrator Joseph Wersetsky, filed a petition in the Tax Court for redetermination of a deficiency in income taxes. After receiving notice of the date of the trial, petitioner failed to appear for trial. The Tax Court granted the Commissioner's motion to dismiss (Pet. Ex. C) and the court of appeals affirmed (Pet. Ex. A).

Briefly, the pertinent facts are as follows. On January 24, 1972, the Commissioner issued to petitioner a statutory notice of deficiency in federal income taxes for the years 1967, 1968, and 1969, in care of Joseph Wersetsky, as Administrator. On April 7, 1972, petitioner mailed a letter to the Tax Court requesting a

copy of the rules for filing a petition with that court (Pet. Ex. G). Petitioner enclosed a copy of the January 24, 1972 notice of deficiency. On April 10, 1972, petitioner's letter was received and filed by the Tax Court as a tentative petition for redetermination, subject to a requirement that the petitioner file a proper petition in accordance with the Rules of the Tax Court within 90 days thereafter.

In response to the Tax Court's action, on May 22, 1972, petitioner filed an amended petition prepared in accordance with Rule 7 of the Rules of Practice of the Tax Court and enclosed the required filing fee of ten dollars. After at least two pretrial conferences and two continuances, the case was called for trial on May 25, 1973. However, petitioner failed to appear for trial.

Prior to the time when the Commissioner moved to dismiss for want of prosecution, the court had stated that petitioner had also failed to appear at an additional pretrial conference scheduled for May 22, 1973, and that, on May 21, 1973, the court had personally informed petitioner that the trial was set for May 25, 1973. In addition, the Commissioner's counsel stated that he had dispatched a telegram to petitioner confirming the date and time of the trial (Appendix A, *infra,* pp. 1a-2a). After hearing the Commissioner's presentation of evidence relating to the determination of the income tax deficiencies, the Tax Court granted the Commissioner's motion to dismiss for want of prosecution (Pet. Ex. C).

1. Dismissal for failure to prosecute is a matter within the discretion of the trial judge, whose action must be sustained unless there has been an abuse of discretion. *Link* v. *Wabash Railraod Co.*, 370 U.S. 626, 630-631. Rule 27(c) of the Rules of Practice of

the Tax Court provides that a case may be dismissed for failure properly to prosecute or that a case may be regarded as submitted by a party whose absence is unexcused. Here, after having been informed of the trial date by both the presiding judge and the Commissioner's trial counsel, petitioner failed to appear at the trial on May 25, 1973. There was accordingly nothing arbitrary or unreasonable in the Tax Court's dismissal of the case.

Petitioner argues (Pet. 8-9), that he failed to attend the trial scheduled for May 25, 1973, because (1) the stipulations proposed by the Commissioner's trial counsel at pretrial conferences "were detrimental to Petitioner's rights and privacy and would jeopardize Petitioner's position to prevail" and (2) the Tax Court Clerk failed to notify him of the place, date, and time the trial would be called under Tax Court Rule 27(c)(1). Whatever petitioner's objections may have been to the stipulations offered by the Commissioner, his unwillingness to stipulate does not excuse his failure to prosecute his case.

Petitioner received adequate formal notice of the setting of his case for trial. As reflected by the Tax Court docket entries, the Clerk of the Tax Court sent petitioner on January 29, 1973 a notice of the place, date, and time of the trial. Although the trial date was subsequently twice continued, petitioner was personally present on each occasion when this was done. In addition, the Commissioner's counsel sent petitioner a telegram repeating the information concerning the setting of the trial (Appendix A, *infra*, pp. 1a-2a). Petitioner has not offered any justifiable excuse for his absence at trial.

2. Petitioner further contends (Pet. 6, 10-14) that his petition in the Tax Court was both defective in form and untimely, so that the Tax Court never acquired jurisdiction, and that the Tax Court was further deprived of jurisdiction by his alleged tender of a $25,000 check on August 28, 1970, for "all Federal Income and Federal Estate taxes to date" (Pet. Ex. I). If petitioner is correct that the Tax Court had no jurisdiction over its case, it has in effect conceded that the Tax Court properly dismissed its suit, although for a different reason than it gave.

Petitioner's jurisdictional challenge to the Tax Court's action was fully answered by the court of appeals, upon which we rely, as follows (Pet. Ex. D, p. 2):

> We have reviewed the record, and the memoranda of both parties, and conclude that petitioner's request is frivolous and it is hereby denied. Indeed, most of that of which petitioner complains was brought about by his own actions. His most important complaint is that the Tax Court took jurisdiction of this petition for review of a deficiency assessment illegally, in that his formal petition was not filed until after the 90 day statutory period had run. The Tax Court had accepted a letter from petitioner which requested a copy of the rules for filing and which was received shortly before the 90 days had run as a "tentative petition." It had done this in order to give the petitioner an opportunity to file in proper form, since the 90 days would otherwise have barred the petition. Having taken advantage of what can only be considered an effort by the Tax Court to bend the rules in the interest of justice, petitioner cannot now complain.

See also *Fiorentino* v. *United States*, 226 F. 2d 619, 621 (C.A. 3); *Continental Petroleum Co.* v. *United States*, 87 F. 2d 91, 94-95 (C.A. 10), certiorari denied, 300 U.S. 679.

Petitioner's argument (Pet. 6, 13-14) that the Tax Court had no jurisdiction because of its alleged tender of a $25,000 check for "all [Federal] income and federal estate taxes to date [August 28, 1970]," is equally without merit. There was no evidence admitted by the Tax Court which would support petitioner's allegation that it tendered such a check. But even assuming *arguendo* that petitioner did so, the Commissioner's acceptance would not have effected a compromise of petitioner's federal income tax liabilities. Under Section 7122 of the Code (26 U.S.C.), a tax liability can be compromised by the Commissioner only after an official statement of the terms of the compromise and the reasons in support of it have been made. See *Rosenman* v. *United States*, 323 U.S. 658; *Moskowitz* v. *United States*, 285 F. 2d 451 (Ct. Cl.). No such administrative steps have been taken in this case. Accordingly, no compromise agreement under a general theory of accord and satisfaction can be imputed to the Commissioner. *Hughson* v. *United States*, 59 F. 2d 17 (C.A. 9), certiorari denied, 287 U.S. 630; *Moskowitz* v. *United States, supra.*

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

APPENDIX A

THE CLERK: Docket Number 2569-72 Estate of Joan Wersetsky, deceased, Joseph Wersetsky, administrator.

MR. SILHASEK: James Silhasek for the Respondent, Your Honor.

(Pause.)

THE COURT: Mr. Wersetsky is not present?

MR. SILHASEK: No, Your Honor.

THE COURT: I wish to state for the record that Mr. Wersetsky was instructed to come to a pretrial conference in my chambers at two o'clock on Tuesday afternoon, he did not make an appearance at that time, that on Monday, while he was present in the courtroom, this trial was set for ten o'clock on Friday morning, and he is not present at this time. We will proceed with the government's fraud part of the case.

MR. SILHASEK: Your Honor, there is no fraud part to the case.

THE COURT: Is there no fraud? I thought there was a fraud penalty involved here.

MR. SILHASEK: There is negligence for failure to file and to pay tax, a negligence penalty, Your Honor.

THE COURT: I see. All right, Mr. Silhasek, do you have a motion to make?

MR. SILHASEK: Yes, Your Honor. At this time, I would like to file a motion to dismiss for lack of prosecution, and in support of that, and in addition to what is stated in the motion, we have attempted to notify the representative of the Petitioner by telephone, but we were

unable to reach him. We did, however, send a telegram to his residence, reminding him that the trial was to take place today, a copy of which was sent to your office, and in support of this motion, if you wish, we will put on the Respondent's portion of the case.

THE COURT: I know, Mr. Silhasek, that you have brought witnesses from Boston for the purpose of this trial, and I am favorably inclined to your motion. I will hold ruling on your motion, and you may put your witnesses on. We will hear your witnesses.

MR. SILHASEK: Okay. Thank you, Your Honor.

THE COURT: And I will determine later on ruling on the motion.

MR. SILHASEK: Would you like for me to make an opening statement, Your Honor? May I?

THE COURT: Yes, you may.